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CURRENT EVENTS.

THE CASE OF THE SURVIVORS OF THE YACHT MIGNONETTE.—This miserable case has excited considerable interest on both sides of the Atlantic, and, in the absence of anything more exciting to talk about, the newspapers have slobbered over it a good deal. Captain Dudley, of the yacht "Mignonette," together with the mate and boy, was cast away at sea in an open boat; and, when in the greatest pangs of hunger and thirst, they concluded that, as the boy had no family to care for, they would kill him in order to save their own precious lives. So, like two beasts, they opened a vein in his arm and sucked the blood out of him until he died. After having committed this horrible crime, God, in his inscrutable providence, permitted them to be rescued. They came home to England and confessed what they had done, as though it were a meritorious act. They were tried for murder and convicted. Their conviction was affirmed by a full bench in the Court of Appeal, and they were sentenced to be hanged. The Home Secretary commuted their sentence to six months imprisonment without labor. They ought to have been hanged. There is only one rule to which men under such extreme circumstances are entitled to resort, and that is the rule of casting lots to see who shall die in order that the rest may live. The only parallel case in the law books of which we have knowledge is that of United States v. Holmes,[1] in which that exuberant and graphic reporter, the late John William Wallace, exhausted all the italics and small caps in a large printing office, in his statement of the case. In that case a number of sailors and passengers had been compelled in a shipwreck to take to the sea in an open boat, which was weighted so heavily that it almost dipped the water. The sea began to freshen, and it became apparent that some of them would have to be thrown overboard to keep the boat from swamping. So the sailors concluded that as it was necessary to have sailors to navigate the boat, they would throw over the passengers. They threw several of them overboard, one after the other, but were careful to save their own precious carcasses as well as that of the negro cook. For this the mate was tried for manslaughter in the United States District court at Philadelphia, and it was held as matter of law, that the case was manslaughter; for though sailor and sailor may lawfully struggle against each other for the single plank which can save but one, yet the sailor and the passenger are not on an equal footing. The sailor remains under a continuing duty to carry the passenger safely; and to this end, if the life of either is to be sacrificed, it must be the life of the sailor rather than that of the passenger. In the case of the Mignonette there was no room for such casuistry. Unless sortition were resorted to, the dictates of humanity required that the boy rather than the men should live. But the men, simply because they were the stronger, pounced upon the boy and sucked out his blood. For this they ought to have been hanged; for while the moral guilt may have been diminished by the extreme circumstances under which the crime was committed, the law is interested in upholding the safety of the weak against the rapacity of the strong, especially under circumstances so peculiarly dangerous to the weak. It is essential for the protection of the weak when thus placed *in extremis*, that the strong should know that if they kill and eat the weak on sea, they must themselves die for it on shore. There is reason to suspect that one of the members of Lieutenant Greely's Arctic party was shot under the sentence of a mock court-martial in order that his judges might eat him. This affair ought to be sifted thoroughly, and if it be found true, those who committed the crime ought to be tried by Court-Martial and hanged.

FELLOW SERVANTS IN THE SAME EMPLOYMENT.—We are glad to lay before our readers in this number, the complete text of the very important decision of the Supreme Court of the United States, in the case of the *Chicago Milwaukee & St. Paul R. Co. v. Ross*, in which a limitation is put upon the doctrine that a master is not liable for an injury to one

[1] 1 Wall. Jr. 1.

servant, caused by the negligence of another servant, engaged in the same common employment with the servant injured. The limitation relates to what is to be deemed the same common employment, within the meaning of the rule; and the court held that the conductor of a freight train in charge of its movements, and the engineer of the same train in charge of its engine, are not fellow servants within the rule, but that the conductor is the vice-principal of the master. Although four of the judges dissented, this decision justifies the confidence which the public have always reposed in the Supreme Court of the United States, where questions of popular right are involved. The decision of the Supreme Judicial Court of Massachusetts in Farwell v. Boston & Worcester R. Co.,[1] where the doctrine which exempts the master from liability was first formulated and enforced by the powerful reasoning of Chief Justice Shaw, has never been entirely satisfactory to the profession. A candid mind will weigh that decision again and again, and still ask itself why the rule of *respondeat superior*, which applies in every other situation, should not apply in the situation of an employee injured by a fellow employee. We are told that there is an implication that the master and servant agreed that the master would not be liable in such cases. But it is a well settled limitation upon the doctrine of implied contracts, that the law never implies a contract contrary to the plain justice of the case; and neither Chief Justice Shaw, nor any other Judge, has ever satisfactorily told us what justice there is in a rule which makes one man an insurer against the carelessness of another man's servant whom he does not employ, whom he can not discharge, and over whom he can not exercise any control. Then, if we consider the other reason which is advanced in support of the rule, that it is necessary to conserve the safety of the employees themselves, because it makes them insurers of each other's carelessness, and consequently watchful over each other's conduct, it is absurd to apply it, except in the case of servants who are laboring together on a common footing, where they *can* watch each other and check each other. It can not, upon any principle of sense, be applied in the case of servants laboring in situations remote from each other; nor can it be applied so as to make an inferior servant a spy upon his superiors,—a principle which would produce insubordination among the servants of a railway company, as quickly as it would destroy the discipline of an army. In the decision elsewhere published, the court were right, beyond all question, in refusing to visit upon the engineer, the consequences of the negligence of the conductor in going to sleep in the caboose,—a fact of which the engineer may have known nothing, and which he could not have prevented if he had known it. Chief Justice Shaw's decision was founded upon a reason which is not stated in the opinion itself. That reason was, that courts of justice ought to conserve the rights of property. The real underlying principle of it was precisely the same as in that unfortunate expression of Mr. Webster, in one of his public speeches, which lost him the presidency, that government is founded upon property. It was a decision in favor of property, and against poverty. But it is the office of government to hold the scales of justice equally between property and poverty. American institutions are especially beneficent; and it best accords with their spirit, that, if the scales are to tip either way, they shall tip in favor of the poor and helpless, rather than in favor of the rich and powerful. Nor does the decision elsewhere published, make a rule that will necessarily inflict loss upon railway shareholders. Railway companies adjust their charges by their operating expenses; and the compensation which, under the operation of this beneficent rule, is paid to the maimed employee, is ultimately distributed against the great public, by whom it is not felt. In this respect, the rule works simpler and better than Prince Bismarck's idea of a governmental insurance for working men. It is worthy of note that, in the very home of the unjust and untenable doctrine, that a master is not liable for the wrongs done by one servant to another servant engaged in the same employment, it is about to receive its death blow through legislative action,—the Massachusetts legislature having several bills to that end now before it.

[1] 4 Metc. 47.

THE INDEPENDENCE OF THE BAR.—A chapter in the works of David Dudley Field, which

have appeared in two volumes, has revived the memory of the proceeding against that great lawyer for contempt before Judge Noah Davis, of the Supreme Court of New York, in the case of Tweed, whose counsel Mr. Field was. The zeal with which Mr. Field defended Tweed was worthy of him as a lawyer, but it was also worthy of a better client and of a better cause. But he was entitled to the rights of advocacy, and these seem to have been overridden by Judge Davis, in citing him for contempt merely because he found it his duty to present to the court his protest against Judge Davis' sitting in the case. The *Law Times*, (London), has the following to say with reference to it:

"There is one other portion of the work which is of deep interest, and that is to be found in the remarks upon 'Judge Davis and the Contempt proceedings.' The history of this case is such as to make us feel with more than usual strength, the value of the traditional dignity and honor of the English Bench and of the integrity and courage of the English Bar. The brief summary of the facts is, that Judge Davis twice tried the same prisoner, that on the first occasion he summed up against the prisoner, and upon the second, counsel for the prisoner handed up a formal protest that Judge Davis ought not to try the case. This protest, after consultation with his brother judges, he treated as a contempt, and his address to the counsel in contempt was received with applause by the junior bar, which as usual, had crowded the court. We can only say that if the law allowed such a thing in England, the honor of the judges would prevent the law from being followed; and we trust the day is far distant when such an address as was delivered by Judge Davis would be received with acclamation by any member of either branch of the profession. Note well, that Judge Davis' monstrous tyranny was the fruit of consultation with his brethern. The conclusion is, that his victims were the only men who emerged from this disgraceful scene without blemished reputation, and that Englishmen may be pardoned if they do not yet see the necessity of Americanizing their judicial system."

It has been held contempt for an attorney to charge the judge with prejudice in a motion for a new trial,[1] but not in a motion for a change of venue.[2]

[1] Harrison v. State, 35 Ark. 458.

[2] Ex parte Curtis, 3 Minn. 274. Some very sound views as to the limits of advocacy will be found in Matter of Pryor, 18 Kan. 72, and *Re* Woolley, 11 Bush. (Ky.) 95.

SUMMARY REMEDIES IN CASES OF RAILWAY DISCRIMINATION.

1. Duty of Carrier Generally.
2. Remedies for Discrimination.
3. Use of the Writ of Injunction.
4. Distinction between Mandamus and Injunction.
5. Cases of Mandamus.
   (a) Refusal of Writ.
   (b) Grant of Writ.
   (c) The True Doctrine.
6. Cases of Injunction.
7. Injunction Allowed by Statute.
8. Conclusion.

1. *Duty of Carrier Generally.*—For a common carrier to refuse reasonable and equal terms and facilities of transportation to all alike, is forbidden by the common law, and in most of our states by statutes more or less minute and stringent, according to the attitude of the people and legislature towards the corporations.

2. *Remedies for Discrimination.*—The remedy for unjust discrimination is a suit for damages, and by statutes in some states are given double and treble damages and attorney fees.

That the action for damages is not in all cases an adequate remedy is easy to be seen. It is emphatically true in our rapid and competitive age, that time is money. If the course of business is blocked for a single day the whole community feels it. What the farmer or merchant wants is to have access to his market, to have cars furnished him, rather than to be relegated to his choice between an action against the railroad company for refusing to carry, or one to recover back excessive charges paid it, with all the chances and delays to which an action at law is liable.

3. *Use of the Writ of Injunction.*—Lord Chancellor Cottenham declared, that he thought it the duty of a Court of Equity, "to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights, for which there is no other remedy."[1] This remark, we think, is worthy

[1] Taylor v. Salmon, 4 Myine & Craig 141, cited in Redfield on R. R., p. 342.

to be observed as a maxim of all judicial tribunals; and it is nowhere more apposite than in cases of unjust discriminations, preferences in rates, and withholding proper facilities by railroads—a class of controversies growing in importance with the growth of corporate power. The subject of this paper is the applicableness of the summary remedies of mandamus and injunction to cases of unjust discrimination by common carriers.

4. *Distinction Between Mandamus and Injunction.*—Technically, the distinction between mandamus and injunction is clear and striking;[2] practically, the differences are slight. At present two points only need be noted: 1. The scope of an injunction (or other decree of a Court of Equity, for between a mandatory injunction and a decree for specific performance the difference is very slight) is wider than that of a mandamus. The one will only be granted to compel a duty plain in its mode of performance as in its obligation,[3] the other may outline a whole course of conduct to be observed. 2. While the existence of an equitable remedy does not affect the jurisdiction to award a mandamus, it does influence the court in the exercise of its discretion in granting it.[4] Certainly, the cases where mandamus has been invoked to remedy injurious discrimination are fewer than where equity has been applied to.

5. *Cases of Mandamus.* (*a*). *Refusal of Writ.* (*b*). *Grant of Writ.* (*c*) *The True Doctrine:*

(*a.*) In *People ex rel Walker v. Babcock*,[5] a mandamus was refused, to compel an Express company to transport fragile goods, subjecting itself to the fullest liability of a common carrier; the court holding that as the relators, a glass company, had been shipping for years by the respondent's company, under conditions of limited liability, without objection, an unquestioned case of right had not been made out, and that an adequate remedy by action existed. In two cases in New York, a mandamus was refused. In the first of these,[6] the railroad refused to take and transport crude oil, though having the facilities for doing it, and afterwards used the cars which had been refused to relators to carry oil offered by other parties. In the second case,[7] the failure to transport arose from the great freight-handlers' strike, which occurred in New York about two years ago.

(*b*). On the other hand, in Illinois,[8] where a railroad, in consequence of arrangements it had made to deliver grain at certain elevators only, refused longer to deliver grain to the relator's elevator, the Court decided mandamus a proper proceeding, holding that in no other way could proper redress be had. Now, the first of these cases hardly seems one for mandamus. The glass company had for years assented to a limited responsibility on the part of the Express company and could not claim the "unquestioned" right necessary to the granting of this writ. The other and conflicting decisions turn really upon the different views of judges as to what an "adequate" remedy is. True, in the second of the New York cases, a distinction is drawn between corporate duties arising from powers conferred by the state, and for public benefit, such as running daily trains or erecting a bridge, and the duty of a common carrier, a duty to the individual only.[9] But the soundness of this distinction may be doubted. A text-writer already cited, says: "It may be laid down as a general rule * * * "that where a specific duty is imposed by law "upon a private corporation and no other ade-"quate or specific remedy is provided for its "enforcement, the writ of mandamus will be granted." [10] (In this case the decision did not go upon the fact of the freight-handlers' strike, which of itself would be ground enough to refuse a mandamus. No court will mandamus a railroad company to yield to the demands of riotous strikers.) We have left, then, two cases, in New York and in Illinois, in direct conflict.

(*c*). *The true doctrine.*—The applicableness of mandamus to the particular class of cases we are considering, while it seems to have the sanction of principle, cannot be said to have any line of decision in its favor.

6. *Cases of Injunction.*—Almost the same facts are presented in Vincent vs. C & A. R.

[2] See High Extraordinary Legal Remedies, 2nd ed. § and *passim*.
[3] High Extra Leg. Rem. chap. 1 *passim*.
[4] High Extra Leg. Rem. 2nd ed., § 20.
[5] 16 Hun. (N. Y.), 313.
[6] People *ex rel* Ohlen v. N. Y., L. E. & W. R. W., 22 Hun. 533.

People v. R. R., etc., 63 Howard's Pr. (N. Y.), 291.
C & N. W. R. W. v. People *ex rel* Hempstead, 56 Illinois, 371.
[9] Citing Morawetz Priv. Corp. § 496.
[10] High, Extra Leg. Rem., § 277.

R.,[11] as in the preceding Illinois case. The railroad refused to deliver grain to the complainant's elevator except at an additional charge, intending to give all the business to an elevator favored by the company. This discrimination was forbidden and an action given by statute. But the court held that the injury could not be covered by damages; that the complainant's business was in danger of being ruined and the statutory remedy would not take away the jurisdiction of equity. A temporary injunction was awarded restraining the railroad from delivering elsewhere than at the complainant's elevator or at any additional charge, grain consigned to him. The Rogers Locomotive Works shipped its locomotives over the Erie Railway. The railroad in order to evade the provision of its charter limiting rates of freight, organized the Locomotive Express Company, giving to it the exclusive right to ship locomotives over the road, and, moreover, refused to return two trucks, the property of the Rogers Works, that that company might be unable even to offer locomotives to the Erie Railway for shipment. Upon motion for preliminary injunction, the defendants were restrained from doing anything to hinder the transportation of the Rogers Company's locomotives, but the Court refused, at that stage of the cause, and as a remedy at law existed, to order the restoration of the trucks, or to compel the railroad company to carry at the established rates.[12] In a Pennsylvania case, the complainants were shipping oil by the Pennsylvania Railroad from Pittsburg to Philadelphia, and thence to New York by another line. The railroad, in order to get the carriage all the way, exacted a higher than the regular rate, offering at the same time to carry all the way through at a reduction from regular rates. The Court granted an injunction prohibiting the extra charge, and decreed an account of the excessive rates theretofore paid.[13] In Maryland,[14] a coal company depending entirely upon the defendant's railroad for access to a market, obtained an injunction prohibiting the demanding of higher than legal rates.

The remaining cases are quite recent. In the Express Companies v. Railroad Companies cases,[15] in the United States Circuit Court at St. Louis, the question was the right of a railroad to grant exclusive express facilities over its line. The Court (Justice Miller and Judges McCrary and Treat) asserted broadly the power and duty of Courts of Equity to compel the extending of equal and proper facilities to all engaged in the express business, and, if necessary, to fix a reasonable rate of compensation. A railroad company agreed with another not to give or take business from any third company within a certain territory. Upon a bill in equity brought by a railroad company which was aggrieved by this agreement the contract was declared void, and a decree granted ordering in direct terms interchange of business with the complainant.[16]

In the United States Circuit Court in Ohio,[17] a railroad, in order to favor a certain stockyard, refused to deliver live stock to the complainant's yard adjoining. The Court awarded a preliminary injunction. It was argued for the defendant that complainant could have adequate relief in a court of law by a suit to recover damages, or by mandamus. But the Court said: "These remedies undoubtedly exist, but is there no other and better remedy for the redress of such wrongs? The defendant by accepting its charter assumed

[11] 49 Illinois, 33.

[12] Rogers Loco. Works v. Erie R. R., 5 C. E. Green, (N. J.) Chancery, 379.

[13] Twells v. Penna R. R., 3 Am. Law Reg., N. S., 728.

[14] 46 Maryland, 15.

[15] 3 Am. and Eng. Ry Cases, 594, and note, Wells v. Oreg. R. & Nav. Co., 16. Id. 16, 71 and 87.

[16] A., T. & S. F. R. R. v. D. & N. O. R. R., 15 Fed. Rep., 650.

The case of the Atchison, Topeka & Santa Fe R. R. vs. the Denver & New Orleans R. R. was taken to the Supreme Court of the U. S. (110 U. S., 607; same case, 16 Am. and Eng. R. R. Cases, 57,) where, by a recent decision, the decree of the court below has been reversed and the bill dismissed without prejudice. The Court (Waite, C. J. delivering the opinion) does not deny the jurisdiction of equity in this class of cases. It asserts, however, that the provision of the constitution of Colorado, that "every railroad shall have the right with its road to intersect, connect with, or cross any other railroad," refers to a mechanical connection, not a business connection; as there is here no such clause as that in the constitutions of some States, "shall receive and transport each others passengers, tonnage and cars loaded or empty, without delay or discrimination," which might make the case different. In the absence of statutory provision, the Atchison, T. & S. F. R. R., while bound to afford to everyone fair and reasonable facilities, is not bound to put the complainant upon exactly the same footing as the Denver & Rio Grande R. R., unless the bill shows that the relations of the latter two companies towards the Atchison, T. & S. F. Co. are just the same. This the bill did not do, and therefore the remedy of the complainant is legislative rather than judicial.

[17] McCoy v. R. R., 22 Am. Law Reg. N. S., 726,

certain obligations in favor of the public in the nature of a *quasi* public trust, and the duty of enforcing the execution of this trust, in the absence of some statute providing another and different remedy, devolves upon Courts of Equity."

7. *Injunctions Allowed by Statute.*—Recent statutes in some states confer an equity jurisdiction in cases of railroad discrimination, etc. Thus, in Ohio[18] an injunction may be had where railroads refuse to receive freight from or discriminate between connecting roads, and where they will not forward freight by the line named by the shipper. In Virginia,[19] the act prescribing maximum rates, forbidding preferences, and the like, provides that for any contravention thereof an injunction may issue restraining the violation of and enjoining obedience to the act. In South Carolina, when a railroad in any manner violates the law or its charter, the railroad commissioner may apply for an injunction.[20] In England, the province of injunctions in cases of unjust discrimination is very wide. By the Railroad Commission Act, the Commissioners' rulings may be enforced by injunction from the Courts to whom an appeal lies from the Commission's decisions. The Courts have so generally supported the Commissioners that not very many cases now arise.[21]

8. *Conclusion.*—The cases which have been reviewed, and especially the more recent ones, show, on the whole, that the rule which forbade a mandatory injunction on a preliminary application is not now observed.[22] Most of the methods of unjust discrimination and extortion by the railways are covered by one or another of the authorities which have been presented. True, no case has been found in which, when a railroad has refused to receive and transport freight, (we are not now referring to interchange of business between companies) it has been compelled to do so. In the New Jersey case cited, this exercise of authority was refused—partly, as it appears, because the application was a preliminary one. But from the reasoning of the authorities, it can hardly be doubted, a little startling though it at first appear, that cases where a common carrier refuses or wilfully delays to transport goods offered him, come within the purview of a court of equity, if in the particular case an action for damages is not a sufficient remedy.

It is said that a bill in Equity will not lie to enforce a merely public duty—there must also be a private wrong.[23] But though this be true, none the less do the authorities before us emphasize a public duty in the corporation as one cause of the Court's jurisdiction. Resting upon this two-fold foundation—its province to interpose where the ordinary remedies are inadequate, and its office of watching over the performance of those duties to the public, which are inseparable from the privileges conferred by the public, the jurisdiction of equity in the class of cases we have in this paper considered, would seem to be complete.

The important bearing which the power of injunction in cases of unjust discrimination should have upon the railroad question must not be forgotten. The weapons of attack upon the abuses of our railroad system have been either the force of public opinion, good as far as it goes, but lacking power, or violent anti-monopoly legislation which, when it is not inoperative, is apt to do as much harm as good. Questions of unjust discrimination are to be settled by decisions in the particular cases rather than by general rules and definitions. The equity remedy of injunction or something akin to it, but still more summary in its operation, must form, as it seems to us, one element in any successful plan of dealing with the railroad question.

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[18] Rev. Stat., §3368 ff.

[19] Act of 1876, Code title 18, Chap. 61, § 26.

[20] Gen'l Stat. 1882, § 1456.

[21] For cases under English R. R. Com. Act, see note to McCoy v. R. R. *supra*.

[22] See Bispham on Equity, 3d ed. § 400, *contra*. Andenried v. P. & R. Co., 68 Penn. St., 370. Hall v. Chesapeake, Ohio & S. W. R. Co. (Court of Chancery of Tenn.) 23 Am. Law Reg. 126. (Difference between prohibitory and mandatory injunction. A mandatory injunction will not be granted on preliminary application.)

[23] Morawetz on Priv. Corp. § 489. Cumberland Valley R. R.'s Appeal, 62 Pa. St. 218.

In the case of the B. & O. R. Co. v. Penn. R. Co. in the U. S. C. C. at Philadelphia, October, 1884, (unreported,) an application for preliminary injunction, to compel the Penn. R. Co. to continue to transport over their road between New York and Baltimore, the cars of the B. & O. R. Co., the Court refused an injunction, on the ground that the case was not a perfectly clear one for equitable relief.

NOTES OF RECENT DECISIONS.

PARENT AND CHILD—MAINTENANCE OF STEP-CHILD.—*In re Besondy*[1] the following points were ruled, which we believe do not express anything novel, though the opinion is an interesting one: A widow, upon her re-marriage, is not liable for the support of her minor child by a former husband, but is entitled to have his income applied thereto. A step-father is not bound to maintain the children of his wife by a former marriage, unless he voluntarily assumes the relation of parent, and receives them into his family, under circumstances such as to raise a presumption that he has undertaken to support them gratuitously. A guardian may be allowed for necessary expenses incurred in the support and maintenance of his minor ward, though no previous order has been made therefor by the court. So an allowance for the past maintenance of an infant may be made in favor of a parent, or other person not bound for the support of such infant, for expenditures necessarily incurred therefor previous to the appointment of a guardian.[2]

[1] 20 N. W. Rep. 366.

[2] See Wilkes v. Rogers, 6 Johns. 594; Re. Bostwick, 4 Johns. Ch., 105; Bruin v. Knott, 12 Sim. 456; Haley v. Bannister, 4 Madd. 279; Mowbry v. Mowbry, 64 Ill. 388; *Re* Cottrell's Estate, L. R. 12 Eq. 569.

LIABILITY OF SURETIES OF U. S. MARSHAL FOR HIS LEVYING UPON THE GOODS OF WRONG PERSON.—In *Lammon v. Fensier*,[1] it is held by the Supreme Court of the United States, that the taking, by a Marshal of the United States, upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable. The opinion of the court, written by Mr. Justice Gray, is one of those opinions which annotate themselves. The learned justice says: "Upon the analogous question whether the sureties upon the official bond of a Sheriff, a Coroner, or a Constable are responsible for his taking upon a writ, directing him to take the property of one person, the property of another, there has been some difference of opinion in the Courts of the several States. The view, that the sureties are not liable in such a case, has been been maintained by decisions in the Supreme Courts of New York, New Jersey, North Carolina and Wisconsin; and, perhaps, receives some support from decisions in Alabama, Mississippi and Indiana.[2] But in People v. Schuyler,[3] the judgment in 5 Barb. 166, was reversed, and the case of *ex parte* Reed [4] overruled by a majority of the New York Court of Appeals, with the concurrence of Chief-Justice Bronson, who had taken part in deciding Reed's Case. The final decision in People v. Schuyler has been since treated by the Court of Appeals as settling the law upon this point.[5] And the liability of the sureties in such cases has been affirmed by a great preponderance of authority, including decisions in the highest Courts of Pennsylvania, Maine, Massachusetts, Ohio, Virginia, Kentucky, Missouri, Iowa, Nebraska, Texas and California, and in the Supreme Court of the District of Columbia.[6]"

[1] 13 Am. Law Record, 193.

[2] *Ex parte* Reed, 4 Hill, 572; People v. Schuyler, 5 Barb. 166; State v. Conover, 4 Dutch. 224; State v. Long, 8 Ired. Law, 415; State v. Brown, 11 Ired. Law, 141; Gerber v. Ackley, 32 Wis. 243, and 37 Wis. 43; Governor v. Hancock, 2 Ala. 728; McElhaney v Gilleland, 30 Ala. 183; Brown v. Mosely, 11 Smedes & M. 354; Jenkins v. Lemonds, 29 Ind. 294; Carey v. State, 34 Ind. 105.

[3] 4 N. Y. 173.

[4] 4 Hill, 572.

[5] Mayor, etc., of New York v. Sibberns, 3 Abb. App. 266, and 7 Daley, 436; Cumming v. Brown, 43 N. Y. 514; People v. Lucas, 93 N. Y. 585.

[6] Carmack v. Com., 5 Bin. 184; Brunott v. McKee, 6 Watts & S. 513; Archer v. Noble, 3 Green. 418; Harris v. Hanson, 2 Fairf. 241; Greenfield v. Wilson, 13 Gray, 384; Tracy v. Goodwin, 5 Allen, 409; State v. Jennings, 4 Ohio St. 418; Sangster v. Com., 17 Grat. 124; Com. v. Stockton, 5 T. B. Mon. 192; Jewell v. Mills, 3 Bush, 62; State v. Moore, 19 Mo. 369; State v. Fitzpatrick, 64 Mo. 185; Charles v. Haskins, 11 Iowa, 329; Turner v Killian, 12 Neb. 580; Holliman v. Carroll, 27 Texas, 23; Van Pelt v. Littler, 14 Cal. 194; U. S. v. Hine, 3 MacArthur, 27.

FELLOW SERVANTS IN THE SAME COMMON EMPLOYMENT.

CHICAGO, MILWAUKEE & ST. PAUL R. CO. v. ROSS.*

Supreme Court of the United States, December 1, 1884.

Railway Negligence—Conductor of Freight Train not a Fellow Servant of the Engineer.—The conductor of a railway freight train is not a fellow servant with the engineer in charge of its engine, within the meaning of the rule which exempts a master from liability for the negligence of his servant, whereby another servant, engaged in the same common employment, is injured; but such conductor is the vice-principal of the company.

In error to the Circuit Court of the United States for the District of Minnesota.

J. W. Cary, for plaintiff in error; *C. K. Davis* and *Enoch Totten*, for defendant in error.

FIELD, J., delivered the opinion of the court:

The plaintiff in the court below is a citizen of Minnesota, and by occupation an engineer on a railway train. The defendant in the court below, the plaintiff in error here, is a railway corporation created under the laws of Wisconsin. This action is brought to recover damages for injuries which

* Affirming s. c., 8 Fed. Rep. 544.

the plaintiff sustained whilst engineer of a freight train by a collision with a gravel train on the 6th of November, 1880. Both trains belonged to the company, and for some years he had been employed as such engineer on its roads. On that day he was in charge of the engine of a regular freight train which left Minneapolis at a quarter past one in the morning, its regular schedule time, and had the right of the road over gravel trains, except when otherwise ordered. At the time of the collision, one McClintock was the conductor of the train, and had the entire charge of running it. It was his duty under the regulations of the company to show to the engineer all orders which he received with respect to the movements of the train. The regulations in this respect were as follows: "Conductors must in all cases, when running by telegraph and special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station. The conductor will have charge and control of the train, and of all persons employed on it, and is responsible for its movements while on the road, except when his directions conflict with these regulations, or involve any risk or hazard, in which case the engineer will also be held responsible."

When the freight train left Minneapolis on the morning of November 6, 1880, there was coming toward that city from Fort Snelling, by order of the company, over the same road, a gravel train, termed in the complaint a wild train, that is, a train not running on schedule time any regular trips. The conductor, McClintock, was informed by telegram from the train despatcher of the coming of this gravel train, and ordered to hold the freight train at South Minneapolis until the gravel train arrived. South Minneapolis is between Minneapolis and the place where the collision occurred. The gravel train had been engaged for a week before in hauling in the night gravel to Minneapolis from a pit near Mendota, for the construction by the company of a new and separate line of railroad between St. Paul and Minneapolis, and the freight train had, during this time, been stopped by the conductor, on orders of the train despatcher, upon side tracks between Minneapolis and St. Paul Junction, for the passage of the gravel train. But on the night of November 6, 1880, he neglected to deliver to the plaintiff the order he had received, and after the train started he went into the caboose and there fell asleep. The freight train of course did not stop at the station designated, but continuing at a speed of fifteen miles an hour, entered a deep and narrow cut three hundred feet in length, through which the road passed at a considerable curve, and on a down grade, when the plaintiff saw on the bank a reflection of the light from the engine of the gravel train, which was approaching from the opposite direction at a speed of five or six miles an hour, and was then within about one hundred feet. He at once whistled for brakes and reversed his engine, but a collision almost immediately followed, destroying the engines, damaging the cars of the two trains, causing the death of one person, and inflicting upon the plaintiff severe and permanent injuries, for which he brings this action.

On the trial the conductor of the gravel train testified that at the time of the collision, he was under orders to run to South Minneapolis regardless of the plaintiff's train; that, having twelve cars loaded with gravel, his train stalled before reaching the cut where the collision happened; that he then separated his train in the middle, took six cars to Minnehaha Station, went back with the engine for the other six cars, and was coming with them through the cut when the collision occurred; that the gravel train had run in the night about a week, and that when he could reach Minneapolis before the starting time of plaintiff's train he ran without orders, otherwise upon orders, and had met or passed plaintiff's train at the same place about every night during the week.

It is evident from this brief statement that the conductor of each train was guilty of gross neglence. The conductor of the freight train was not only required by the general duty devolving on him, as one controlling its movements, to give to its engineer such orders as would enable him to avoid collision with other cars, but as we have seen, he was expressly directed by the regulations of the company, when running by telegraph or special orders, to communicate them to him. Had these regulations been complied with the collision would have been avoided. The conductor of the gravel train allowed it be so overloaded that its engine was incapable of moving it at one portion of the road before reaching the cut; and when, in consequence, he was obliged to leave half of his cars on the track while he took the others to Minnehaha, he omitted to send forward information of the delay or to put out signals of danger. Having, for the week previous, passed the freight train at nearly the same place on the road, he must have known that by the delay there was danger of collision. Ordinary prudence therefore would have dictated the sending forward of information of his position or the putting out of danger signals. Had he done either of these things the collision would not have occurred.

The collision having been caused by the gross negligence of the conductors, the question arises whether the company is responsible to the plaintiff for the injuries which that collision inflicted upon him.

The general liability of a railroad company for injuries, caused by the negligence of its servants, to passengers and others not in its service is conceded. It covers all injuries to which they do not contribute. But where injuries befall a servant in its employ, a different principle applies. Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensa-

tion for his employer. The obvious reason for this exemption is that he has or, in law, is supposed to have them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid. There is also another reason often assigned for this exemption—that of a supposed public policy. It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant.

But however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence.

When the service to be rendered requires for its performance the employment of several persons, as in the movement of railway trains, there is necessarily incident to the service of each, the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such cases, that he takes upon himself the risks arising from the negligence of his fellow servants, while in the same employment, provided always the master is not negligent in their selection or retention or in furnishing adequate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable. The doctrine was first announced in this country by the Supreme Court of South Carolina in 1841, in Murray v. Railroad Co., 1 McMillan, 385, and was affirmed by the Supreme Court of Massachusetts the following year in Farewell v. Boston and Worcester Railroad Co., 4 Met. 49. In the South Carolina case a fireman, whilst in the employ of the company, was injured by the negligence of an engineer also in its employ, and it was held that the company was not liable, the court observing that the engineer no more represented the company than the fireman; that each in his separate department represented his principal; that the regular movement of the train of cars to its destination was the result of the ordinary performance by each of his several duties; and that it seemed to be on the part of the several agents a joint undertaking where each one stipulated for the performance of his several part; that they were not liable to the company for the conduct of each other, nor was the company liable to one for the conduct of another, and that as a general rule, when there was no fault in the owner, he was only liable to his servants for wages.

In the Massachusetts case an engineer employed by a railroad company to run a train on its road, was injured by the negligence of a switch-tender, also in its employ, and it was held that the company was not liable. The court placed the exemption of the company, not on the ground of the South Carolina decision, that there was a joint undertaking by the fellow servants, but on the ground that the contract of the engineer implied that he would take upon himself the risks attending its performance, that those included the injuries which might befall him from the negligence of fellow servants in the same employment, and that the switch-tender stood in that relation to him. And the court added, that the exemption of the master was supported by considerations of policy. "When several persons," it said, "are employed in the conduct of one common enterprise or undertaking, and the safety of each depends on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other." And to the argument, which was strongly pressed, that though the rule might apply where two or more servants are employed in the same department of duty, where each one can exert some influence over the conduct of the other, and thus, to some extent, provide for his own security, yet, that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another, it answered, that the objection was founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. "When the object to be accomplished," it said, "is one and the same, when the employers are the same, and the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the cir-

cumstances of every case." And it added, "that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant his better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself, and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." 4 Met. 49, 60.

The opinion in this case, which was delivered by Chief Justice Shaw, has exerted great influence in controlling the course of decisions in this country. In several states it has been followed, and the English courts have cited it with marked commendation.

The doctrine of the master's exemption from liability was first distinctly announced in England in 1850 by the Court of Exchequer in Hutchinson v. The York, etc., R. Co., 5 Exch. Reps. 343. Priestly v. Foster, 3 Mees. & Wels. 1, which was decided in 1837, and is often cited as the first case declaring the doctrine, did not directly involve the question as to the liability of a master to a servant for the negligence of a fellow-servant. In that case a van of the defendant in which the plaintiff was carried was out of repair and overloaded and consequently broke down, and caused the injury complained of; but it did not appear what produced the defect in the van or by whom it was over-loaded. The court in giving its decision against the plaintiff observed that if the master was liable, the principle of that liability would "carry us to an alarming extent;" and in illustration of this statement said that if the owner of a carriage was responsible for its sufficiency to his servant, he was, under the principle, responsible for the negligence of his coach-maker or harness-maker or coachman, and mentioned other instances of such possible responsibility to a servant for the negligence of his fellows, concluding that the inconvenience of such consequences afforded a sufficient argument against the application of the principle to that case. The case, therefore, can only be considered as indirectly asserting the doctrine. At any rate, the Hutchinson case is the first one where the doctrine was applied to railway service. There it appeared that a servant of the company who, in the discharge of his duty, was riding on one of its trains, was injured by a collision with another train, of the same company from which his death ensued; and it was held that his representatives could not recover as he was a fellow-servant with those who caused the injury; and the court said that whether the death resulted from the mismanagement of the one train or the other, or of both, did not effect the principle. The rule was applied at the same time by that court to exempt a master-builder from liability for the death of a bricklayer in his employ, caused by the defective construction of a scaffolding by his other workmen, by reason of which it broke and the bricklayer at work upon it was thrown to the ground and killed. Wigmore v. Jay, 5 Exch. 354.

The doctrine assumes that the servant causing the injury is in the same employment with the servant injured, that is, that both are engaged in a common employment. The question in all cases therefore is, what is essential to render the service in which different persons are engaged a common employment. And this question has caused much conflict of opinion between different courts, and often much vacillation of opinion in the same court.

In Bartonshill Coal Co. v. Reid, and the same company v. McGuire, reported in 3d Macqueen, H. L. Cases, decided in 1858, the parties injured were miners employed to work in a coal pit, and the party, whose negligence caused the injury, was employed to attend to the engine by which they were let down into the mine and brought out, and the coal was raised which they had dug; and it was held that they were engaged in a common work, that of getting coal from the pit. "The miners," said the court in the latter case, "could not perform their part unless they were lowered to their work, nor could the end of their common labor be attained unless the coal which they got was raised to the pit's mouth, and of course at the close of their day's labor the workmen must be lifted out of the mine. Every person who engaged in such an employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person entrusted with the machinery might be occasionally negligent and fail in his duty." Lord Chancellor Chelmsford, who gave the principal opinion in the latter case, referred to previous cases in which the master's exemption from liability had been sustained, and said: "In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service,' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case to ascertain whether the servants are fellow laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he can not be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon another, by carelessness or negligence in the course of his peculiar work, is not within the exemption, and the master's liability attaches in that case in the same manner as if the injured servants stood in no such relation to him." The Lord Chancellor also commented upon some decisions of the Scotch courts, and among

others that of McNaughton v. The Caledonian Railway Company, 19 Court of Sess. Cases, 271, and said that it might be "sustained without conflicting with the English authorities on the ground that the workmen in that case were engaged in totally different departments of work; the deceased being a joiner or carpenter, who, at the time of the accident, was engaged in repairing a railway carriage, and the persons by whose negligence his death was occasioned, were the engine driver and the persons who arranged the switches." And in the same case Lord Brougham, after mentioning the observations of a judge of the Scottish courts that an absolute and inflexible rule releasing the master from responsibility in every case where one servant is injured by the fault of another was utterly unknown to the law of Scotland, said that it was also utterly unknown to the law of England, and added: "To bring the case within the exemption there must be this most material qualification, that the two servants must be men in the same common employment, and engaged in the same common work under that common employment."

Later decisions in the English courts extend the master's exemption from liability to cases where the servant injured is working under the direction of a foreman or superintendent, the grade of service of the latter not being deemed to change the relation of the two as fellow servants. Thus, in Wilson v. Merry, decided by the House of Lords in 1868, on appeal from the Court of Session of Scotland, the sub-manager of a coal pit, whose negligence in erecting a scaffold which obstructed the circulation of air underneath, and led to an accumulation of fire-damp that exploded and injured a workman in the mine, was held to be a fellow servant with the injured party. And the court laid down the rule that the master was not liable to his servant unless there was negligence on the master's part, in that which he had contracted with the servant to do, and that the master, if not personally superintending the work, was only bound to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work; that when he had done this, he had done all that he was required to do, and if the persons thus selected were guilty of negligence, it was not his negligence, and he was not responsible for the consequences; L. R. 1 H. L. Scotch App. 326. In this case, as in many others in the English courts, the foreman, manager, or superintendent of the work, by whose negligence the injury was committed, was himself also a workman with the other laborers, although exercising a direction over the work. The reasoning of that case has been applied so as to include, as contended here, employees of a corporation in departments separated from each other; and it must be admitted that the terms "common employment," under late decisions in England, and the decisions in this country following the Massachusetts case, are of very comprehensive import. It is difficult to limit them so as to say that any persons employed by a railway company, whose labors may facilitate the running of its trains, are not fellow servants, however widely separated may be their labors. See Holden v. Fitchburg Railroad Co., 129 Mass. 268.

But notwithstanding the number and weight of such decisions, there are, in this country, many adjudications of courts of great learning, restricting the exemption to cases where the fellow servants are engaged in the same department, and act under the same immediate direction; and holding that, within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment. It is not, however, essential to the decision of the present controversy to lay down a rule which will determine, in all cases, what is to be deemed such an employment, even if it were possible to do so.

There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation, must apply to all, and many corporations operate every day several trains over hundreds of miles, at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow servant with the firemen, the brakemen, the porters and the engineer. The latter are fellow servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation. As observed by Mr. Wharton in his valuable Treatise on the Law of Negligence: "It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute

to it personal negligence in cases where it is impossible for it to be negligent personally. But if this be true, it would relieve corporations from all liability to servants. The true view is, that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." Sec. 232 *a*. The author, in a note, refers to Brickner v. New York Central R. Co., decided in the Supreme Court of New York, and afterwards affirmed in the Court of Appeals; and to Malone v. Hathaway, decided in the latter court, in which opinions are expressed in conformity with his views. These opinions are not, it is true, authoritative, for they do not cover the precise points in judgment; but were rather expressed to distinguish the questions thus arising from those then before the court. They indicate, however, a disposition to engraft a limitation upon the general doctrine as to the master's exemption from liability to his servants for the negligence of their fellows, when a corporation is the principal, and acts through superintending agents. Thus, in the first case, the court said: "A corporation can not act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee, equally with themselves, represents the corporation as master in all those respects. And though, in the performance of these executive duties, he may be, and is, a servant of the corporation, he is not, in those respects a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms, any more than is a director who exercises the same authority." 2 Lansing, 516. Affirmed in 49 N. Y. 672.

And in Malone v. Hathaway, in the Court of Appeals, Judge Allen says: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duties, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal. These acts are in such case the acts of the corporation, for which and for whose neglect the corporation, within adjudged cases, must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care." 64 N. Y. 5, 12. See also Corcoran v. Holbrook, 59 Id. 517.

In Little Miami Railroad Company v. Stevens, the Supreme Court of Ohio held that where a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the cars were to start, and when to stop, it was liable for an injury received by him caused by the negligence of the conductor. 20 Ohio, 415. There a collision between two trains occurred in consequence of the omission of the conductor to inform the engineer of a change of places in the passing of trains ordered by the company. Exemption from liability was claimed on the ground that the engineer and conductor were fellow servants, and that the engineer had in consequence taken, by his contract of service, the risk of the negligence of the conductor; and, also, that public policy forbade a recovery in such cases. But the court rejected both positions. To the latter it very pertinently observed that it was only when the servant had himself been careful that any right of action could accrue to him, and that it was not likely that any would be careless of their lives and persons or property merely because they might have a right of action to recover for injuries received. "If men are influenced," said the court, "by such remote considerations to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation that, in any extensive business where many persons are employed, the care and prudence of the employer is the surest guarantee against mismanagement of any kind." In Railway Company v. Keary, (3 Ohio State, 201,) the same court affirmed the doctrine thus announced, and decided that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible, holding that the conductor in such case was the sole and immediate representative of the company upon which rested the obligation to manage the train with skill and care. In the course of an elaborate opinion the court said that from the very nature of the contract of service between the company and the employees, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. "For this purpose," said the court, "the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner, and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man, and a party to the contract of service, owes

to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command and theirs to obey and execute. No service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other."

In Louisville and Nashville Railroad Company v. Collins, 2 Duvall, 114, the subject was elaborately considered by the Court of Appeals of Kentucky. And it held, that in all those operations which require care, vigilance and skill, and which are performed through the instrumentality of superintending agents, the invisible corporation, though never actually, is yet always constructively present through its agents who represent it, and whose acts within their representative spheres are its acts; that the rule of the English courts, that the company is not responsible to one of its servants for an injury inflicted from the neglect of a fellow servant, was not adopted to its full extent in that State, and was regarded there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason. In commenting upon this decision in his Treatise on the Law of Railways, Redfield speaks with emphatic approval of the declaration that the corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority. "The consequences of mistake or misapprehension upon this point," says the author, "have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company. We trust that the reasonableness and justice of this construction will at no distant day induce its universal adoption." 1 Vol. 554.

There are decisions in the courts of other States more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding,—and the present case requires no further decision,—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.

If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train the objections urged to the charge of the court will be readily disposed of. Its language in some sentences may be open to verbal criticism; but its purport touching the liability of the company is, that the conductor and engineer, though both employees, were not fellow servants in the sense in which that term is used in the decisions; that the former was the representative of the company, standing in its place and stead in the running of the train, and that the latter was, in that particular, his subordinate, and that for the former's negligence, by which the latter was injured, the company was responsible.

It was not disputed on the trial that the collision which caused the injury complained of was the result of the negligence of the conductor of the freight train, in failing to show the engineer the order which he had received, to stop the train at South Minneapolis until the gravel train, coming on the same road from an opposite direction, had passed; and the court charged the jury, that if they so found, and if the plaintiff did not contribute to his injury by his own negligence, the company was liable, holding that the relation of superior and inferior was created by the company, as between the two in the operation of its train; and that they were not, within the reason of the law, fellow servants engaged in the same common employment.

As this charge was, in our judgment, correct, the plaintiff was entitled to recover upon the conceded negligence of the conductor. The charge on other points is immaterial; whether correct or erroneous, it could not have changed the result; the verdict of the jury could not have been otherwise than for the plaintiff. Without declaring, therefore, whether any error was committed in the charge on other points, it is sufficient to say that we will not reverse the judgment below if an error was committed on the trial which could not have affected the verdict. Brobst v. Brock, 10 Wall. 519. And, with respect to the negligence of the conductor of the gravel train, no instruction was given or requested.

Judgment affirmed.

Brady, Matthews, Gray and Blatchford, JJ., dissenting.

NOTE.—The principal case may be profitably read in connection with a recent decision in the Supreme Court of Appeals of Virginia in Moon v. Richmond, etc. R. Co.[1] Both are interesting additions to the mass of decisions upon the question, who are fellow-servants engaged in the same common employment, within the meaning of the rule in Farwell v. Boston, etc., R. Co.,[2] which exempts a master from liability where one servant has been injured through the negligence of another servant. The Virginia Court hold, as we understand the scope of their decision, the following propositions: 1. Where the servant through whose negligence the injury has been produced is placed in authority over the

[1] 8 Va. L. J. 540.
[2] 9 Met. 49; s. c. 2 Thomp. Neg. 924.

servant injured, though employed with him at the same place, and in the same department of service, he is not the fellow-servant of the latter, but the vice-principal of the master. Therefore the conductor of a railway construction train was not a fellow-servant engaged in the same common employment with a laborer on the train under his command; but was, in respect of such laborer, the vice-principal of the company; and therefore, if the conductor was negligent while engaged in making up the train, whereby the laborer was killed, the company would be liable to the administrator in damages. 2. That servants of the same master are not fellow-servants within the meaning of the rule, when they are so far engaged in distinct departments of the master's service that one can exercise no watchfulness or corrective influence over the other. Therefore a squad of track-repairers on a line of railway were not, within the meaning of the rule, engaged in the same common employment with a laborer on a construction train who was killed, and therefore the negligence of the "section foreman" in charge of such a squad of track repairers, in failing to signal the construction train, whereby it was turned from the track, and the laborer employed thereon killed, was, in respect of the right of action of the administrator of such laborer, the negligence of the company. In support of the first of these propositions, that the train conductor was not, within the rule, the fellow-servant of the train laborer, Fauntleroy, J., in giving the opinion of the court, cited a number of cases.[3] The case of Railroad Co. v. Fort,[4] was closely in point; for there it was held that the superintendent of a machine shop was not a fellow servant with an errand boy employed in the shop, but was the representative of the master. A ruling almost precisely similar was made by Lord Cockburn, C. J., at *nisi prius*, to the effect that the foreman of a factory was, in respect of a girl employed there, the vice-principal of the common employer.[5] So, it has been held in Rhode Island, that the engineer of a manufacturing establishment is, in respect of the foreman, the vice-principal of the master.[6] The Supreme court of Missouri held, in one case, that a mere superintendent of work was the vice-principal of a railway company.[7] The same has been held of an architect in charge of the erection of a building, in respect of a person at work on the same;[8] of a railway section boss, in respect of a man working under him;[9] of a railway locomotive engineer and a common laborer working with him about the engine.[10] But the Virginia case is most aptly supported by the able judgment of the Supreme Court of Michigan, in Chicago, etc. R. Co. v. Bayfield,[11] by Cooley, J., in which it was held, as here, that the conductor of a railroad construction train was not, within the meaning of the rule, a fellow-servant with a boy of seventeen employed as a common laborer on the train. The Virginia court say: "The fellow-servant or co-employe for whose negligence the company is not liable, is one who is in the same common employment, that is, in the same shop or place with and having no authority over the one injured, and who is no more charged with the discretionary exercise of powers and duties imperatively resting on the company than the injured party."[12] This is quite similiar to the conclusion of the Supreme Court of Tennessee, which holds it proper to instruct the jury that "if they shall find that the injury was caused by the carelessness of an employee of the company occupying a superior and commanding position to that held by the deceased, then the plaintiff will be entitled to recover.[13] Against these and other decisions to the same general effect[14] we find a mass of authority to the effect that the mere fact the negligent servant is, in his grade of employment, superior to the injured servant, does not take the case out of the rule which exonerates themaster,[15] and hence that a mere foreman of work is, within the rule, a fellow-servant with those under his control.[16]

[3] Greenleaf v. Ill. Cent. R. Co., 29 Iowa, 14; Railroad Co. v. Fort, 17 Wall. 553; Brother v. Carter, 57 Mo. 373; Patterson v. Pittsburgh, etc., R. Co., 76 Pa. St. 389.

[4] 17 Wall. 553; Affg. s. c. 2 Dill. 259.

[5] Grizzle v. Frost, 3 Fost. & Fin. 622.

[6] Mann v. Oriental Print Works, 11 R. I. 152.

[7] Cook v. Hannibal, etc., R. Co., 63 Mo. 397.

[8] Whalen v. Centenary Church, 62 Mo. 326.

[9] Louisville, etc., R. Co. v. Bowler, 9 Heisk. 866.

[10] Louisville, etc. R. Co. v. Collins, 2 Duval, 114.

[11] 37 Mich. 205. To the same effect see Lalor y. Chicago, etc., R. Co., 52 Ill. 401.

[12] Moon v. Richmond, etc., R. Co., 8 Va. L. J. 540, 544.

[13] Nashville etc. R. Co. v. Jones, 9 Heisk. 886.

[14] Little Miami R. Co. v. Stevens, 20 Ohio, 415; Cleveland etc. R. Co. v. Keary, 3 Ohio St. 201; Berea Stone Co. v. Craft, 31 Ohio St., 287, 292; Louisville etc. R. Co. v. Collins, 2 Duv. 114; Whalen v. Mad River etc. R. Co., 8 O. St. 251; Conway v. Belfast etc. R. Co., L. R. 9 C. L. 498; Allen v. New Gas. Co., 1 Exch. Div. 251.

[15] O'Connell v. Baltimore etc. R. Co., 20 Md. 212; McGowan v. St. Louis etc. R. Co., 61 Mo. 528; Columbus etc. R. Co. v. Arnold, 31 Ind. 174; Thayer v. St. Louis etc. R. Co., 22 Ind. 26, per Perkins, J.; Daubert v. Pickel, 4 Mo. App. 590; Cumberland Coal and Iro Co. v. Scolly, 27 Md. 589; Shanck v. Northern etc. R. Co., 25 Md. 462; O'Connor v. Roberts, 120 Mass. 227, Albro v, Agawam Canal Co., 6 Cush, 75; McLean v. Blue Point M. Co., 51 Cal. 255; Faulkner v. Erie R. Co., 49 Barb. 324; Conway v. Belfast etc. R. Co., L. R. 9 C. L, 498; Murphy v. Smith, 19 C. B. (N. S.) 361; s. c. 12 L. T. (N. S.) 605; Howells v. Landore Siemens Steel Co., L. R. 10 Q. B. 62; s. c. 44 L. J. (Q. B.) 25; 32 L. T. (N. S.) 19; 23 Week. Rep. 335; Allen v. New Gas Co., 1 Exch. Div. 254; Gallagher v. Piper, 16 C. B. (N. S.) 669; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Lawler v. Androscoggin R. Co., 62 Me. 463; Feltham v. England, L. R. 2 Q. B. 33, (reversing s. c. 4 Fost. & Fin. 460); Wilson v. Merry, L. R. 1 H. L. Sc. App. 326.

[16] Marshall v. Schricker, 63 Mo, 308; Summersell v. Fish, 117 Mass. 312; Zeigler v. Day, 123 Mass. 152; Hamilton v. Iron Mountain R. Co., 4 Mo. App. 564, 565; Weger v Pennsylvania R. Co., 55 Pa. St. 460; Halverson v. Nisen 3 Sawyer, 562; Malone v. Hathaway, 64 N. Y. 5; Brown v. Maxwell, 6 Hill, 592; Sherman v. Rochester etc. R. Co., 17 N. Y. 153, (affirming 15 Barb. 574); Hofnagle v. New York etc. R. Co., 55 N. Y. 608; Murphy v. Smith, 19 C. B. (N. S.) 361; s. c. 12 C. B, (N. S.) 605.

BREACH OF CONTRACT BY PUTTING IT OUT OF ONE'S POWER TO PERFORM—REMEDY.

REUSENS v. MEXICAN NATIONAL CONSTRUCTION COMPANY.

United States Circuit Court, S. D. New York, December 13, 1884.

1. *Contract—Breach of, by Putting it out of One's Power to Perform.* When one party to an executory contract voluntarily puts it out of his power to perform it, the other party may treat it as terminated, and sue to recover whatever damages he may have sustained through its non-performance.

2. ——. *Illustration.* A railway company agreed to pledge certain collaterals to secure a loan. It afterwards executed a deed conveying the collaterals to a trustee, but upon conditions materially different from

the ordinary contract of pledge. It was held that a person who had advanced money under the original agreement, might sue for and recover the same in an action for money had and received, without waiting for the maturity of the loan.

3. *Action—For Money Had and Received lies when.*—Where moneys advanced upon an executory contract, which the contracting party fails to perform, the other party may elect either to sue upon the contract and recover damages for its breach, or to treat the contract as rescinded, and recover back his money, as upon a consideration which has failed. *Aliter*, if there has been a part performance of the contract.

Opinion of Judge WALLACE on demurrer to the complaint.

Michael H. Cardozo, of counsel for plaintiff; *Joseph H. Choate*, of counsel for defendant.

The demurrer to the complaint raises the question whether the plaintiff can recover as for money had and received upon the following facts:

In May, 1883, the defendant sought subscriptions to a loan to be made to it of $2,000,000, to aid in constructing the railroad of the Mexican National Railway Company; and on May 30, 1883, the plaintiff became a subscriber to the extent of $25,000, upon the terms of a contract of subscription. By this contract the defendant agreed to deposit in trust with a trustee named, certain securities aggregating in nominal value $20,000,000 as collateral for the re-payment of the $2,000,000 loan on or before September 15, 1884.

On October 1st, 1883, the plaintiff had paid the amount subscribed by him in installments as called by the defendant, and had received receipts therefor, which were not transferable without the consent of the defendant. It was provided by the contract of subscription that such receipts should be exchanged for formal certificates of interest in the loan authenticated by the trustees upon payment of the last installment of the subscription.

Before the payment of the last installment by the plaintiff, the defendant transferred to the trustee named in the contract, the securities specified therein, but this was done by a trust indenture which prescribed the powers and duties of the trustee respecting the use and sale of the securities. Among other things this trust idenure provided that the trustee should execute from time to time, as requested by defendant, certificates of interest, entitling the registered holders to an interest in the securities or the proceeds thereof in case of a sale by him "under the provisions of the trust indenture," bearing the same proportion to the whole as the amount of each certificate should bear to $2,000,000. The indenture also provided that the trustee should not sell the securities to satisfy the loan, unless holders of certificate representing twenty-five per cent. of the whole amount should request him to do so; and it also provided, that the holders of a majority in interest might waive any default in the payment of the loan on the part of the defendant, or instruct the trustee to do so, and extend the defendant's time for payment, and suspend or postpone the sale by the trustee, of the collaterals at their discretion.

So far as appears, the plaintiff was ignorant of the terms of the indenture, when he paid the installments of his subscription, but after it was executed, demanded a certificate of defendant, of the character specified in the contract of subscription. The defendant refused such a certificate, but offered one such as it had authorized the trustee to execute by the terms of the trust indenture.

The first question is whether the deposit made of the collaterals, under the terms of the trust indenture, was such a departure from the contract of subscription as to amount to a breach of that contract.

The contract was silent as to the conditions upon which the bonds should be deposited with the trustee, aside from the stipulation that the loan should be secured by an assignment in trust of the specified collaterals which were to be deposited with the trustee. The reasonable implication, however, is that they were to be deposited to secure the repayment of the loan on the contract day, and that the trustee was to exercise the ordinary rights of a pledgee to sell the securities and satisfy the debt for the benefit of the subscribers. Such a pledge would doubtless confer upon every subscriber a qualified right to call upon the trustee to satisfy the amoun due to him by a sale of the securities. But the fund created was a joint fund for the benefit and protection of the whole body of subscribers, and therefore is not to be dealt with upon the intervention of a single *cestui que trust* to the disadvantage of the others. If the trust assignment had provided that the trustee should not sell the securities, unless a sale should be advantageous to the common interests of the *cestui que trust*, it would be unobjectionable, because it would only prescribe a condition which would be implied, and which a court of equity would impose in the exercise of its jurisdiction over trusts, if applied to by any of the parties in interest. But the indenture contains arbitrary restrictions upon the powers of the trustee, which he can not disregard, and which materially impair the rights of the subscribers. It substitutes the discretion of twenty-five per cent. in interest of the *cestui que trust*, in place of the discretion of the trustee, and requires him at the intervention of a majority of the subscribers, to extend the time of payment and postpone a sale of the securities. The plaintiff did not consent to the creation of such a trust. The conditions may have been designed to promote the best interests of all the subscribers; they may have been wise and expedient; but they were not such as were authorized by the plaintiff's contract. A court of equity might reform the terms of the trust indenture if a suit were brought for that purpose, but so long as they stand would have to adhere to them, if called upon to intervene upon the application of the *cestui que trust*.

It remains to consider whether the plaintiff can recover back his money in an action for money

had and received, or whether his remedy is merely one for a breach of contract.

The subscription agreement was a separate and independent contract between the defendant and each subscriber. The defendant could maintain a suit against each subscriber upon his failure to pay the amount of the subscription, and it must follow that each subscriber has a corresponding right of action against the defendant for any breach of the contract on its part towards him. Similar contracts have been frequently adjudged to confer a several liability and a several right of action on the part of each subscriber. Thompson's Liability of Stockholders, Sec. 114; Whittlesey v. Franz, 74 N. Y. 456.

It is a familiar rule, that when one party to an executory contract puts it out of his power to perform it, the other may regard it as terminated, and has an immediate right of action to recover whatever damages he has sustained. Ford v. Tilley, 6 Barn & C. 325; Bowdell v. Parson. 10 East, 359; Heard v. Bowers. 23 Pick., 455-460; Shaw v. Republic Life Ins. Co. 69 N. Y. 293; U. S. v. Behan, 110 U. S. 329; Lovell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264.

The plaintiff was under no obligation to tender his receipts. They were merely vouchers. They were not to be exchanged for formal certificates, but when the defendant had put it beyond its power to deliver the proper certificates, the plaintiff was not bound to tender them. No demand of the certificates was necessary after defendant had incapacitated itself from giving them.

Where money is advanced upon an executory contract, which the contracting party fails to perform, it is in the election of the other party either to sue upon the agreement and recover damages for a breach, or treat the contract as rescinded and recover back his money, as paid upon a consideration which has failed. 'Hill v. Rewer, 11 Met. 271; Brown v. Harris, 2 Gray, 359; Wheeler v. Board, 12 John. 363; Lyon v. Annable, 4 Conn. 350; Appleton v. Chase, 19 Maine, 74; Shepherd v. Hampton, 3 Wheat. 200; Smithhurst v. Woolston, 5 Watts and S., 106. If there had been a part performance of the contract, by which the plaintiff received some benefit and the defendant could not be restored to the previous situation, the plaintiff's only remedy would have been for the breach of agreement, and his damages would be measured by his loss. Hunt v. Silk, 5 East, 449; Foss v. Richardson, 15 Gray, 306; Nash v. Lull, 102 Mass., 60. He has received nothing however under the contract, and the law implies a promise on the part of the defendant to pay back what it has received.

Judgment is ordered for plaintiff on the demurrer.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY—*Inference of Trustee's Authority to Receive Payment of a Note.*
   No authority in a trustee in a trust deed to collect the principal debt secured, and to enter satisfaction on the record of the trust deed, can be inferred from the fact that the money was borrowed of the holder of the note through a firm of brokers, of which the trustee was a member, and that payments of interest on the note had been made to him before. *Stiger v. Bent*, S. C. Ill., Springfield, September 27, 1884.

2. ———. *Burden of Proof to Show Agent's Authority.*
   Where an agent has the possession of a promissory note after due, it may be inferred that he has authority to receive payment of it; but the burden is on the debtor who makes payment to the agent, relying upon such inference to show that the note was in his possession when the payment was made, and the fact that the note is neither surrendered nor offered to be surrendered, affords evidence he did not have it. *Ibid.*

3. ASSIGNMENT—*By Debtor Residing in Foreign State—Rights of Domestic Creditors.*
   An assignment made by a resident of another State, whose laws are identical with those of this State, carries under it a debt due from a resident of this State as against a subsequent garnisheeing creditor of this State. *Askew v. Ly Cygne Bank*, S. C. Mo. December 22, 1884.

4. ———. *Set-off.*
   A debtor of a bank which makes an assignment, can set-off against the note given by him to the assignor, when sued thereon, a deposit by him in said bank, although at the time of such assignment, the note was not due, both debts being due at the commencement of the action. *Smith v. Spengler*, S. C. Mo., December 22, 1884.

5. BANK CHECK—*Not an Assignment.*
   A check is not an assignment at law or in equity, *pro tanto*, of the deposit of the drawer, nor does it confer any lien upon it, when drawn for only a part of drawer's deposit. *Coates v. Doran*, S. C. Mo., December 22, 1884.

6. ———. *Extension of Time to Discharge Drawer—Notice—Release of Drawer by Discharge of Drawee—Consideration.*
   1. The taking of an acceptance of a check from the drawee, and of a part payment without any stipulation for delay, is not such an extension as will release the drawer. 2. Where the bank is insolvent, and the drawer is treasurer thereof, or if solvent, and he owed the bank so much that he could not claim the payment of the check, he is not entitled to notice of its dishonor. 3. If a bank upon which a check is drawn becomes insolvent and the asignee accepts the check as a demand and assents to its full payment, and on the margin of the proof of the claim is the statement that the debt is discharged and the allowance accepted in full satisfaction, but the same is not paid, such action did

not discharge the drawer, for there was no discharge, and if one had been attempted, it would have been without consideration. The sureties for such drawer upon a debt, to discharge which such check was given, therefore remained bound. *Warrensburg Co-operative Building Association v. Zoll*, S. C. Mo., November 24, 1884.

7. CONSTITUTIONAL LAW.—*Inter-State Commerce—Exclusive Power of Congress over—States have no Permissive Power over—Kansas "Maximum Freight Law" Confined to Railways within the State.*
Under article 1, section 8 of the Constitution of the United States, the power of Congress to regulate commerce among the States—inter-state commerce—which consists, among other things, in the transportation of goods from one State to another, is exclusive. The fact that Congress has not seen fit to prescribe any specific rules to control or regulate the transportation of goods from a place in one State to a place in another—inter-state commerce—does not empower the States of the Union to regulate such commerce. Its inaction on the subject, when considered with reference to its other legislation, is equivalent to a declaration that inter-state commerce shall be free and untrammeled. Section 57, chapter 23, Comp. Laws of 1878 known as the "Maximum Freight Rate Law" of 1868, had no application to fix or limit the charges for transportation of freight from another State into this State, because, if it was intended to apply to such inter-state commerce, it was in violation of article 1, section 8, of the Constitution of the United States and therefore void. *Hardy v. Atchison, etc., R. Co.*, 32 Kan.; S. C., 30 Alb. L. J. 487.

8. EVIDENCE.—*Identifying a Person by the Sound of his Voice.*
Evidence by which a witness swears to the identity of a person by the sound of his voice is competent, although the witness had never heard him speak but once before; its credibility is for the jury, [Compare Com. v. Williams, 105 Mass. 62.] *Com. v. Hayes*, S. C. Mass., November, 1884.

9. ———. *Production of Promissory Note by Payee—Evidence of Non-payment.*
The production of a promissory note secured by a trust deed, on the hearing of a bill to foreclose, raises a *prima facie* presumption that it has not been paid, and is still lawfully belonging to the complainant. *Stiger v. Bent*, S. C. Ill., Springfield, September 27, 1884.

10. HOMICIDE.—*Self-Defence—Taking Instructions to the Jury.*
1. An instruction in a murder trial that the deceased might have protected himself by taking the life of the accused, and that he would be guilty of murder if he slew the deceased in resisting the attempt of the deceased to defend himself, is erroneous, because it does not take any notice of the necessity of the accused having done some overt act, calling into existence the right of self defense. 2. The jury in such a case is entitled to take the instructions of the Court to the jury room. State v. Phelps, 74 Mo. 128; State v. Butterfield, 75 Mo. 297. Overruled. *State v. Thompson*, S. C. Mo., December 15, 1884.

11. INDICTMENT—*Obscene Matter Must be Set Out.*
Where an indictment charges the accused with publishing obscene matter, the matter complained of must he set out in full in the indictment, or he can plead his constitutional privilege by a motion to quash. *State v. Hayward*, S. C. Mo., December 15, 1884.

12. INFORMATION BY PRIVATE PERSON—*Must be upon Actual Knowledge.*
An information by a private person, must be made upon his actual knowledge, not upon information and belief, else it is void. *State v. Hayward*, S. C. Mo., December 15, 1884.

13. MORTGAGE—*Unauthorized Entry of Satisfaction—Its Effect.*
An entry of satisfaction of a deed of trust by the trustee, when the indebtedness secured by it has not been paid, and the act is not authorized by the holder of the indebtedness, will have no effect upon the deed of trust as between the original parties, nor as to subsequent purchasers with notice. *Stiger v. Bent*, S. C. Ill., Springfield, September 27, 1884.

14. ———. *An Incident to the Debt.*
In equity, a deed of trust is but an incident to the debt it secures, and will pass with an assignment of the debt to the holder. *Ibid.*

15. ———. *Of Notice of Trustee's want of Authority to enter Satisfaction.*
Where a trustee enters satisfaction of a trust deed duly recorded, in consequence of a negotiation for the purchase of the land, and for the purpose of consummating the sale, and accepts payment of the amount of the debt secured from such purchaser, without producing and cancelling the note, and without authority from the holder thereof, the purchaser can not be said to have purchased without notice of the rights of the holder of the note. *Ibid.*

16. NEW TRIAL—*Stranger Intermeddling with Jury not always Ground for—Alter, if Successful Party Intermeddles.*
As a general rule, a motion for a new trial is addressed to the discretion of the presiding judge. It has been held that an improper intermeddling with the jury by a party in whose favor a verdict is rendered, or by an officer of the court, will be a ground for a new trial; and that the law will not inquire what was the effect of such intermeddling, if it was of such a nature as to have any tendency to affect the verdict injuriously to the party against whom it is found. Woodward v. Leavitt, 107 Mass. 453, and cases cited. Read v. Cambridge, 124 Mass. 567. But the rule of law does not go so far as to make every intermeddling with the jury by a stranger, a conclusive ground for a new trial. After a verdict was rendered for the plaintiff, a motion was made by the defendants for a new trial; and it was shown that during the trial, one Allyn, a witness for the defendants, approached two of the jurors, and said to them, "You are on our cases, keep your head level, and do what is right." This was done without the knowledge of the defendants. It was held, under the circumstances, not an abuse of discretion, to refuse a new trial. *Johnson v. Witt*, S. C. Mass., November, 1884.

17. PRIVATE INTERNATIONAL LAW—*Bastardy Proceedings where Mother and Child are Non-residents.*
A proceeding in bastardy may be maintained in this State under chapter three, title one, division seven, Revised Statutes, by an unmarried woman, the mother of a bastard child, notwithstanding the child was begotten and born in another State, and the mother and child never were residents of Ohio. *McGary v. Bevington*, S. C. Ohio; 2 Am. L. J. 79.

18. SALES OF PERSONALTY—*Implied Undertaking that Goods shall be of Same Quality as those Sent under Previous Orders.*
A manufacturer of steel having, in obedience to several orders from a customer, furnished the latter

with steel of a certain quality, if upon receipt of a subsequent order from the same customer for the same article, he supplies an inferior quality, he is liable upon his undertaking that the steel was of the quality ordered, and such liability is not lessened by the fact that the customer did not avail himself of his opportunity to test the steel before using it. If there is a warranty of kind and quality, the purchaser has a right to assume the warranty to be true, and therefore he may sell with like warranty, and defend suits for the breach, and recover of the vendor. *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159; S. C., 30 Alb. L. J. 490.

19 STATUTE OF FRAUDS—*Agreement to Purchase Land—Part Performance—Pleading—General Denial.*

1. A contract by an agent, to procure certain land from the owner by purchase, for his principal, is within the statute of frauds, and, if the agent take the title in his own name, and refuse to convey to his principal, the latter has no remedy. 2. The agent, having not even received the purchase money, and the principal having never had possession, nor made any improvements, the principal can receive no relief. 3. The general denial is sufficient to enable a defendant to take advantage of the statute. *Allen v. Richard*, S. C. Mo., December 1, 1884.

20. SUBROGATION—*Owner of Land Paying to Save His Land from Incumbrance.*

The purchaser of land, subject to a prior incumbrance, has the right to pay off the debt, and thus relieve his land, and to receive the note evidencing the debt, for his own protection; and if such payment is not made, under a previous contract with the party owing the same, the party so paying is entitled to be subrogated to all the rights of the holder of the indebtedness. *Stiger v. Bent*, S. C. Ill., Springfield, September 27, 1884.

21. ———. *Right of Party Paying to its Possession.*

If payment of a note is made by one, of the note of another, pursuant to a contract that he shall pay the same, the party paying may be regarded as the agent of the debtor, and, as such, is entitled to receive and hold the note as an evidence of his payment, as well as for his own protection. *Ibid.*

22. SURETYSHIP—*Discharge of Surety by Extending Time of Payment—Waiver—New Promise.*

1. To make a promise binding when made by a surety, after extensions granted by the creditor, without the surety's consent, it must appear that when he made the promise to pay, notwithstanding such extensions, he knew they were made for a definite time, and for a legal consideration. 2. When one instruction touches upon a fact which is material, the omission to refer to such fact in the other instructions is immaterial, when the necessity of such fact is made apparent. So held with regard to the omissions by the court, to mention the necessity for the creditor, knowing of the relation of surety of principal, when one of the instructions distinctly referred to it. *Merchant's Ins. Co. v. Houck*, S. C. Mo., December 1, 1884.

23. WAREHOUSEMAN.—*Commingling Another Man's Grain with His Own, not Liable for Accidental Loss by Fire.*

Where a warehouseman receives grain to be stored for the owner, and places it in a common bin with his own or that received from other depositors, and sells from this receptacle, retaining always sufficient to supply each owner, the contract continues one of bailment, and the warehouseman is not liable for a loss resulting from an accidental fire not attributable to his wrong or negligence. [Compare 10 Am. Rep. 581; 74 Ill., 213; 42 Iowa, 38; 3 Hill (N. Y.), 545.] *Rice v. Nixon*, 97 Ind.; S. C. 30 Alb. L. J. 486.

24. WATER.—*Liability of Railway Companies for Erection of Embankments and Bridges—Obstruction of Surface and Natural Water.*

1. A railroad company lawfully constructing a bridge over a stream, is not liable for retarding the flow thereof unless it was negligent in the construction of said bridge, the safety of the public to be cons dered in the determination of such question. The fact that the railroad made a substitute bridge soon after, does not go to prove such negligence. 2. A railroad is not liable for obstructing the flow of surface water by the erection of embankments, or bridges, if it properly constructed them. It is not bound to provide water-ways for the escape of such water, and water overflowing from a natural stream in times of flood is surface water within this rule. Former cases overruled and the doctrine of the old cases re-established. *Abbot v. Kansas City, etc., R. Co.*, S. C. Mo., December 15, 1884.

QUERIES AND ANSWERS.

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

1. A. owns a hive of bees. The bees swarm and light in an hollow tree, standing on B.'s land, where they make honey. When A. goes to get the honey, B. forbids him taking it. Whose honey is it? Give reasons and authority. F. D. D.

Des Moines, Iowa.

QUERIES AND ANSWERS.

Query 46. [19 C. L. J. 458.] A. owns real estate valued at $5,000. To secure an indebtedness, B. takes mortgage upon the same for its full value. Long time after execution of the mortgage and before maturity, A. sells the real estate to C, subject to the mortgage of B. B. brings foreclosure and the real estate goes to sale. At the sale no bidders are present save B., who makes a bid of $1,000, and to whom the real estate is sold at that price. The actual value of the property is $5,000, and was the same at time of sale. Query: As against C. and his rights in said real estate, has the mortgage lien of B. been extinguished, by the foreclosure and bid of $1,000, by B., and if C. redeems from that sale, can B. further disturb C. in his title thereto? An answer with full citations, will accomodate an attorney who represents the interests of C.

Answer.—Upon foreclosure, the lien of the mortgagee merges in that of the judgment. Any person purchasing under a judicial sale, takes a good title free and clear of the lien under which it was sold. Property would not bring a fair value if purchasers were obliged to take an imperfect title, or one that could only be perfected by a suit in Chancery. (Jackson v. Edwards, 22 Wend. 498.) This rule is manifestly just and reasonable; for what would be the sense of buying land at a judicial sale, if the judgment, under which it was sold, were still to remain a lien for an unrealized balance? And the rule is not different

where the judgment creditor buys in the property. And, even if the judgment remained a lien on the land, in this case, for the balance due and unrealized, would not such lien merge in the greater interest acquired by B., upon the purchase? Undoubtedly it would. The question is, whether C., upon redeeming from B., has anything further to fear from B. in the quiet enjoyment of the land. There is a difference in the interest acquired by a redeeming owner of the fee and a redeeming creditor. The former redeems the land: the latter, strictly speaking, the senior incumbrance. The redeeming owner of the fees redeems all the right, title and interest of the purchaser (Pardee v. VanAuken, 3 Barb. 534.) as laid down in Jackson v. Edwards, *supra*; the purchaser takes a good title, and, as a redeeming owner of the fee, redeems all the right, title and interest of the purchaser; *ergo* C. redeems the good title acquired by B., on the sale. Two or more separate and existing interests in land, can not be in the same person at one time. The lesser merges in the greater. When B. purchased the premises, the lien of his judgment was extinguished, even if there were a balance due upon his judgment beyond the amount of his bid. (Russell v. Allen, 10 Paige, 249.) The judgment is against the debtor, and not against the property. There is no obligation on C.'s part to pay A.'s indebtedness to B. A.'s land was responsible so far as it would go for the amount of the mortgage. B. looked to C.'s land, exhausted his legal remedy in that direction, and failed to realize the full amount of his claim. For the balance he must look to his judgment debtor. The land brought all it could on the sale, and it cannot be twice disturbed under the same judgment. There is no privity between C. and B., and the lien can not revive to C.'s discomfort, for the balance of the judgment. It could only revive as a lien on the property, where the judgment debtor acquired a subsequent title. (Russell v. Allen, *supra*.)

New York. JOHN T. WALSH.

Query 24. [19 C. L. J. 458.] Sec. 13. Art. 19, constitution of Arkansas, declares: "All contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest." The act of the legislature of the same State, approved Feb. 9, 1875, enacts that no person shall directly or indirectly take or receive in money any greater sum for the loan or forbearance of money than 10 per cent.; that all contracts whatever, whereupon or whereby there shall be reserved or agreed to be reserved any greater sum for the loan or forbearance of any money than 10 per cent., shall be void. Under this state of the law would a stipulation inserted in a promissory note that if it were not paid at maturity a per cent, exceeding the rate of ten per cent. per annum would be charged as a penalty for nonpayment be void? Would the rule be different if there was no such stipulation in the promissory note, but the parties thereto, after the instrument reached maturity, agreed upon an extra rate of interest exceeding ten per cent. per annum, as a penalty for non-payment.

Answer.—The requisites of a usurious contract are (1) an agreement for a profit in the nature of interest (2) at a greater rate than that allowed by law (3) for the loan or forbearance of money. Lloyd v. Scott, 4 Peters 205; N. Y. Firemens Ins. Co. v. Ely, 2 Cowen, 678; U.S. Bank v. Waggener 9 Peters, 400, 401; Agricultural Bank v. Bissell 12 Pick. 586; Bardwell v. Howe, 1 Clarke, 281; Stevens v. Davis 3 Metcalf, 211. Any contract lacking any one of these attributes is not usurious, and hence not subject to the penalties imposed, by statutes fixing the rate of interest to be charged, for their breach.

1. In regard to the first question, by subjecting the case stated to the test of this rule, we find that the excess to be paid over the legal rate of interest, being a penalty from which the debtor may relieve himself by punctuality, it cannot be considered as usury, and therefore neither the agreement to pay the principal, nor the excess, is void under the statute. Lloyd v. Scott, 4 Peters S. C. R. 203; Cotton v. Dunham, 2 Paige Rep. 267; Campbell v. Shields, 6 Leigh, 517; Coster v Dilworth 8 Cow. 299; Ketchum v. Barber 4 Hill 224; Boulware v. Newton, 18 Grat. 708. But under the general power of equity, undoubtedly a court of chancery would relieve against the penalty, and allow only the principal with lawful interest. Aylett v. Dodd 2 Atk. 239; Astley v. Weldon 2 B. & P. 350, 354; Lampman v. Cochran 16 N. Y. 275; Clement v. Cash, 21 N. Y. 253, 260; Rogan v. Walker, 1 Wis. 527; Gregg v. Landis, 21 N. J.; Hagar v. Buck, 44 Vt. 285; Sloman v. Walter, Bro. Ch. 418.

2. With respect to the second question, the rule would be different thus far: while the subsequent agreement, after maturity of the note to pay interest at a rate exceeding that allowed by law would be void under the statute, that subsequent unlawful agreement will not invalidate the right to enforce the former legal one. Parker v. Ramsbottom, 3 B. & C. 257; Gray v. Fowler, 1 H. Bl. 462; Parker v. Cousins, 2 Grat. 387; Rankin v. Rankin 1 Grat. 155; Bank of Washington v. Arthur, 3 Grat. 173, 186; Chit. on Bills, 89.

Louisville, Ky. N. F. MARTINE.

Query 60. [19 C. L. J. 479.] Is a *nolle prosequi*, by the States Attorney a sufficient legal termination of a criminal cause to maintain an action for malicious prosecution? And especially so when made in words as follows: "And comes now the State's Attorney and represents to the court that he has no evidence to prosecute this cause, and, with the permission of the court this cause is *nolle prosequi*."

Answer.—Stanton v. Hart, 27 Mich. 539, decides this question in the affirmative. The court say: "Upon this question there is some conflict in the authorities, but we think the weight of reason is in favor of the action. The mischief is done by the arrest and disgrace caused by a charge of crime, and by the expence and annoyance attending the proceeding." "As soon as the proceedings have come to an end, by such an order or discontinuance as well prevent a further prosecution without a new complaint, there is no longer any occasion for such a presumption. It is more reasonable to assume that it has been found that the charge ought not to be further pressed. And it would be doing great injustice to refuse a remedy for such a wanton injury to liberty and reputation, on a ground which is purely technical, and is not reasonable." The opinion then cites Clark v. Cleveland, 6 Hill, 344, and adds: "Discharge by a magistrate, discontinuance of a private action, and ignoring bills by grand juries, when the party is discharged, have all been made the basis of an action for malicious prosecution." Citing Smith v. Ege, 52 Pa., St. 419; 1 Am. Lead. Cas. 221; Straus v. Young, 36 Md. 246; Burhaus v. Sanford, 19 Wend. 417; Fay v. O'Neill, 36 N. Y. 11.

Also, in favor of the same rule, see Minor (Ala.) 203; 36 Conn. 56; 4 Am. Rep. 35; 45 Ind. 440; 1 B. Monr. 358; 7 Iredell (Law), 390; 3 McCord, 461; 44 Vt. 124. See also 41 N. J. Law, 22. As against the rule, the following cases may be cited, the courts holding a *nolle prosequi*, without any judicial action by the court, not sufficient to support a suit for malicious prosecution Blalock v. Randall., 76 Ills. 224; Bacon v. Toune, 4 Cush. 217; Bunn v. Lakeman, 12 id. 482; Hamilburgh v. Shepard, 119 Mass., 30. Also see Kirkpatrick v. Kirkpatrick, 39 Penn St. 288. I also find the case of Driggs v. Burton, 44 Vt. 124, cited against the proposition, as well as in its favor. Not having the report, I

let it stand on both sides for reference. I think the reasons given by the Michigan Court, permitting the action after a *nolle prosequi*, are very cogent, and that the rule adopted by it ought to prevail.

Jackson, Miss. J. A. PARKINSON.

Answer No. 2.—Yes: Woodworth v. Mills, 20 N. W. Rep. 728; s. c. 30 Alb. L. J. 508. ED. C. L. J.

CORRESPONDENCE.

WHETHER AN ASS IS A HORSE WITHIN THE MEANING OF EXEMPTION LAWS.—The Supreme Court of Texas has decided that a jackass is a horse,[1] and has followed in this opinion the Supreme Court of Tennessee,[2] quoting with apparent approval the following language of the Tennessee court: "We are not without high philological authority for construing the word 'horse,' used in the statute, as including the 'ass.' Mr. Webster, in his unabridged and illustrated dictionary, defines an ass to be a quadruped of the genus *Equus*, (*E. Asinus*), having a peculiarly harsh bray, etc. * * * Then, the ass is a species of the genus *equus* or horse." The obvious fallacy in this reasoning of the Tennessee court lies in the last two words of this quotation, namely, in the assumption that the "genus *equus*," and the "horse" are identical, and thus confusing the part with the whole. The fact is, and a little further search in Webster would have shown it, that the term genus signifies a class embracing usually two or more species; and that in zoology a test of species is that the individuals composing it are capable of indefinitely continued fertile reproduction through the sexes. The "genus *Equus*" does not mean "the horse;" it means a class of animals including at least three species, *equus caballus*, the horse, *equus zebra*, the zebra, and *equus asinus*, the ass. It is well known that the progeny of the horse and ass are not fertile. The mule has neither pride of birth nor hope of posterity; and this test shows at once that the horse and the ass are not of the same species, though belonging to the same genus. The deer and the giraffe have been classed by some under the same genus, *Cervus*. Would a Swedish statute exempting reindeer include giraffes? The poodle and the wolf are both of the genus *Canis*. Would a wolf be included in a statute respecting dogs? The "harmless necessary cat" is of the same genus as the leopard: Is the leopard included in a statute respecting cats? Mr. Webster correctly states that the genus *Solanum*, in botany, includes the potato, the egg-plant, the deadly nightshade, and the tomato: Would a statute in regard to potatoes include egg-plants, night-shades and tomatoes? If the syllogism of the Tennessee court is not fallacious, it would be equally easy to show by its instrumentality that a horse is an ass, that a horse is a zebra, that an ass is a zebra, that a zebra is a horse and that a zebra is an ass. In the Texas case it would seem that Robertson, having judgment against Robinson, presumed to levy on a jackass belonging to the latter, although a Texas statute exempted, *inter alia*, two horses. For this presumption he is visited with costs and probably with damages. When such results are reached,—where judges declare that a part is equal to the whole, that animals are of the same species because they are of the same genus, that a giraffe is a reindeer and an egg-plant is a potato, is it not time for the simple citizen to introduce another variety into the genus *Equus* and say with the well-known character of Dickens that "the law is an ass." H.

[1] Robinson v. Robertson, 18 Rep. 604.
[2] Richardson v. Duncan, 2 Heisk. 220.

JETSAM AND FLOTSAM.

OUR NEW DEPARTURE.—A learned correspondent writes: "I see that you have opened a new department in your LAW JOURNAL, called 'Jetsam and Flotsam.' Why did you not call it 'Jetsam, Flotsam and *Ligan*?'" Answer: We omitted "Ligan" because we claim to be men of truth.

——AN INSTANCE OF CLASS LEGISLATION.—The most odious instance of class legislation which has come to our attention is the law of South Carolina, which exempts capital from taxation when engaged in manufactures. It seems that they have a similiar law in Louisiana. The constitutions of these two States must be singular instruments, if these laws can be upheld as valid. Capital engaged in manufacturing enjoys the benefit of a high protective tariff, from which benefit agriculture is almost wholly deprived. Is that not enough?

THE CURL IN COURT.—*Mr. Choate:*—He has seen fit to quote for your entertainment a description of my face and features that he gathered from a newspaper. *Mr. Conkling:*—A periodical, some publication. *Mr. Choate:*—The periodical may have risen to the rank of an illustrated weekly. I don't like to lie down under that imputation, and I will return it, but not, gentlemen, from any newspaper. No, no. I will paint his picture as it has been painted by an immortal pen. I will give you his description as the divine Shakespeare penned it, for he must have had my learned friend in his eye when he said:

> See, what a grace was seated on this brow:
> Hyperion's curls: the front of Jove himself;
> An eye like Mars, to threaten and command;
> A combination and a form, indeed,
> Where every God did seem to set his seal,
> To give the world assurance of a man.

Mr. Conkling:—Correct; you have recited that first-class."—*N. Y. Sun.*

LINCOLN'S ESTIMATE OF EVARTS.—The candidacy of Wm. M. Evarts, for the U. S. Senate is drawing considerable attention to his character as a lawyer and a public man. Among other things which have appeared in press, is the following from the pen of Schuyler Colfax, in the *Congregationalist*, which shows that if the good sense of Mr. Lincoln had had its way, Evarts would have been appointed Chief Justice of the United States, instead of Salmon P. Chase. The difference between the two men was conspicuous; Chase was a statesman, but not a lawyer; Evarts was a lawyer, but not, at that time, a statesman:—"Less than four months after Secretary Chase's resignation, (followed, as I regret to say, by some ill-tempered remarks from the ex-Secretary against the President, which I am sure he soon regretted) the great office of Chief Justice of the Supreme Court became vacant; and, in Congress, as well as amongst press and people, there was developed a strong and rapidly increasing public opinion in favor of the appointment of ex-Secretary Chase. It happened that, by the request of numerous fellow-members of the House in which I presided, it devolved upon me to spend an evening with the President, to present their desires. After urging every possible consideration, namely, that as Chief Justice, Mr. Chase would give up that ambition for the Presidency which had dominated his later life, and that on the bench we felt that he could not fail to stand by the war-measures he had assisted in shaping in the Cabinet, etc., Mr. Lincoln replied: "I am satisfied that it is the wish of a large majority of my supporters that I should appoint Mr. Chase, and I intend to do so, although I think myself, that William M. Evarts is, by his legal attainments, the fittest man for the place."